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8                   UNITED STATES DISTRICT COURT  
9                   WESTERN DISTRICT OF WASHINGTON  
10                  AT SEATTLE

11                 RYAN KARNOSKI, et al.,

12                  Plaintiffs,

13                  v.

14                 DONALD J. TRUMP, et al.,

15                  Defendants.

16                  CASE NO. C17-1297-MJP

17                  ORDER GRANTING MOTION TO  
18                  COMPEL; DENYING MOTION  
19                  FOR PROTECTIVE ORDER

20         THIS MATTER comes before the Court on Plaintiffs' Motion to Compel Defendants'  
21         Discovery Withheld Under the Deliberative Process Privilege (Dkt. No. 245) and Defendants'  
22         Motion for Protective Order (Dkt. No. 268). Having reviewed the Motions, the Responses  
23         (Dkt. Nos. 266, 278), the Replies (Dkt. Nos. 273, 281), the Supplemental Briefs  
24         (Dkt. Nos. 289, 292, 293) and the related record, and having considered the submissions of the  
parties at oral argument, the Court GRANTS Plaintiffs' Motion to Compel and DENIES  
Defendants' Motion for Protective Order.

## Background

## I. Procedural History

On July 26, 2017, President Donald J. Trump announced a ban on military service by openly transgender people (the “Ban”). On March 23, 2018, following the Court’s entry of a preliminary injunction, the President issued a Presidential Memorandum (the “2018 Memorandum”) directing the Department of Defense (“DoD”) to implement the Ban. (Dkt. No. 224, Ex. 3.) That same day, Defendants moved to dissolve the preliminary injunction. (Dkt. No. 215.) On March 29, 2018, Defendants requested to preclude discovery pending resolution of their motion to dissolve the preliminary injunction. (Dkt. No. 225.) The Court denied that request and ordered discovery in the case to proceed. (Dkt. No. 235.) The Court explained:

To the extent that Defendants intend to claim executive privilege, they must “expressly make the claim” and provide a privilege log “describ[ing] the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.”

(Id. at 3 (quoting Fed. R. Civ. P. 26(b)(5)(i)-(ii))).)

On April 13, 2018, the Court ordered the preliminary injunction to remain in effect and granted partial summary judgment against the Ban. (See Dkt. No. 233.) The Court held that the Ban would be subject to strict scrutiny, but declined to rule on its constitutional adequacy. (Id.) The Court observed that “[w]hether Defendants have satisfied their burden of showing that the Ban is constitutionally adequate (i.e., that it was sincerely motivated by compelling state interests, rather than by prejudice or stereotype) necessarily turns on facts related to Defendants’ deliberative process.” (Id. at 28.) Because those facts were not yet before it, the Court directed the parties “to proceed with discovery and prepare for trial on the issues of whether, and to what

1 extent, deference is owed to the Ban and whether the Ban violates equal protection, substantive  
2 due process, and the First Amendment.” (*Id.* at 31.) Defendants filed a notice of appeal and  
3 requested that the Ninth Circuit stay the preliminary injunction pending its review. (Dkt. No.  
4 236); see also Karnoski v. Trump, No. 18-35347, Dkt. No. 3 (9th Cir. May 4, 2018). On July 18,  
5 2018, the Ninth Circuit denied the request, holding that “a stay of the preliminary injunction  
6 would upset, rather than preserve, the status quo.” (Dkt. No. 295.) The appeal is set to be heard  
7 in October 2018. (Dkt. No. 296.)

8 **II. The Requested Discovery**

9 Throughout this litigation, Plaintiffs have sought discovery regarding:

- 10 • The identity of the individuals with whom President Trump discussed or  
11 corresponded regarding policies on military service by transgender people;  
12 • The date on which President Trump decided that transgender people should be  
13 banned from military service;  
14 • The process by which President Trump formulated the Ban, including identification  
15 of “all sources of fact or opinion” he “consulted, considered, or otherwise referred to”  
16 in formulating the Ban;  
17 • Documents and communications related to President Trump’s consultation with  
18 employees, agents, contractors, or consultants of the United States Armed Forces  
19 regarding military service by transgender people;  
20 • Documents and communications relating to, and including all drafts of, the 2017  
21 Memorandum;  
22 • Communications between President Trump and Congress concerning military service  
23 by transgender people prior to August 26, 2017; and  
24 • Documents relating to visits and communications between President Trump and his  
Evangelical Advisory Board.

(Dkt. No. 278 at 3-4; Dkt. No. 268 at 4-5.)

To date, Defendants have objected to each of these requests and have withheld or  
redacted tens of thousands of documents based on the deliberative process privilege. President

1 Trump has refused to substantively respond at all based on the presidential communications  
2 privilege. (Dkt. No. 245 at 8-9; Dkt. No. 246, Ex. 28; Dkt. No. 278 at 4-5.)

3 On May 10, 2018, Plaintiffs moved to compel responses withheld under the deliberative  
4 process privilege. (Dkt. No. 245.) On May 21, 2018, Defendants moved to preclude discovery  
5 directed at President Trump. (Dkt. No. 268.) These motions are now before the Court.

6 **Discussion**

7 **I. Trump v. Hawaii**

8 Before turning to the merits of the pending discovery motions, the Court addresses the  
9 impact of the Supreme Court’s recent ruling in Trump v. Hawaii, 138 S.Ct. 2392 (2018). In  
10 Hawaii, the Supreme Court held that President Trump’s policy restricting the entry of certain  
11 foreign nationals did not violate the Immigration and Nationality Act or the Establishment  
12 Clause. The majority found the policy to be “facially neutral toward religion” and plausibly  
13 related to the government’s stated national security objectives. Id. at 2418-24. While  
14 Defendants claim that the same reasoning precludes discovery directed to President Trump in  
15 this case, the Court disagrees for the following reasons:

16 First, Hawaii involved an entirely different standard of scrutiny. The Court already ruled  
17 that the Ban is subject to strict scrutiny (Dkt. No. 233 at 20-24) and rejects Defendants’  
18 suggestion that it “turns on a medical condition—gender dysphoria—and its treatment, not on  
19 any protected status.” (Dkt. No. 289 at 5.) Unlike the policy in Hawaii, the Court need not “look  
20 behind the face” of the Ban, as the Ban is facially discriminatory. 138 S.Ct. at 2420. President  
21 Trump’s announcement explains that “the United States Government will not accept or allow . . .  
22 Transgender individuals to serve in any capacity in the U.S. Military” (Dkt. No. 149, Ex. 1); the  
23 2017 Memorandum, 2018 Memorandum, and Implementation Plan are titled “Military Service  
24

1 by Transgender Individuals.” (Dkt. No. 149, Ex. 2; Dkt. No. 224, Exs. 1, 3.) That the Ban turns  
2 on transgender identity—and not on any medical condition—could not be clearer.<sup>1</sup>

3 Second, the majority in Hawaii repeatedly emphasized that the exclusion policy was  
4 formulated following a “worldwide, multi-agency review.” See, e.g., 138 S.Ct. at 2404-06,  
5 2408, 2421. This review considered risks “identified by Congress or prior administrations” and  
6 involved the Department of Homeland Security (DHS), the State Department, “several  
7 intelligence agencies,” and “multiple Cabinet members and other officials.” Id. at 2403-05. The  
8 majority considered this process “persuasive evidence” that the policy had “a legitimate  
9 grounding in national security concerns, quite apart from any religious hostility.” Id. at 2421. In  
10 contrast, Defendants in this case have provided no information whatsoever concerning the  
11 process by which the Ban was formulated.

12 Finally, Hawaii does not purport to address the scope of discovery or the application of  
13 any privilege. For these reasons, the Court finds that Hawaii does not impact its consideration of  
14 either of the pending motions.

15 **II. Plaintiffs’ Motion to Compel**

16 Plaintiffs move to compel documents withheld under the deliberative process privilege.  
17 (Dkt. No. 245.)

18 The deliberative process privilege protects documents and materials which would reveal  
19 “advisory opinions, recommendations and deliberations comprising part of a process by which

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21                   <sup>1</sup> The Implementation Plan prohibits transgender people who have *never* been diagnosed  
22 with gender dysphoria from serving unless they are “willing and able to adhere to all standards  
23 associated with their biological sex.” (Dkt. No. 224, Ex. 1 at 4, Ex. 2 at 7.) As the Court  
24 previously noted, “[r]equiring transgender people to serve in their ‘biological sex’ . . . would  
force [them] to suppress the very characteristic that defines them as transgender in the first  
place.” (Dkt. No. 233 at 13.)

1 governmental decisions and policies are formulated.” N.L.R.B. v. Sears, Roebuck & Co., 421  
2 U.S. 132, 150 (1975). For the privilege to apply, a document must be (1) “predecisional,”  
3 meaning that it was “generated before the adoption of an agency’s policy or decision,” and (2)  
4 “deliberative,” meaning that it contains “opinions, recommendations, or advice about agency  
5 policies.”<sup>2</sup> FTC v. Warner Commc’ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984). “Purely factual  
6 material that does not reflect deliberative processes is not protected.” Id.

The deliberative process privilege is not absolute. Several courts have recognized that the privilege does not apply in cases involving claims of governmental misconduct or where the government's intent is at issue. See, e.g., In re Sealed Case, 121 F.3d 729, 738, 746 (D.C. Cir. 1997); In re Subpoena Duces Tecum, 145 F.3d 1422, 1424-25 (D.C. Cir. 1998). However, “[t]his appears to be an open question in the Ninth Circuit,” Vietnam Veterans of Am. v. CIA, 2011 WL 4635139, at \*10 (N.D. Cal. Oct. 5, 2011), and even where there are claims of governmental misconduct, courts in this district and circuit have applied a balancing test. See, e.g., Wagafe v. Trump, No. 17-094RAJ, Dkt. No. 189 (W.D. Wash. May 21, 2018); All. for the Wild Rockies v. Pena, No. 16-294RMP, 2017 WL 8778579, at \*6-8 (E.D. Wash. Dec. 12, 2017); Thomas v. Cate, 715 F. Supp. 2d 1012, 1021 (E.D. Cal. 2010). For purposes of this motion, the Court assumes, without deciding, that applying the balancing test set forth in Warner, 742 F.2d at 1161, is appropriate.

19 In Warner, the Ninth Circuit instructed courts to consider whether “[Plaintiffs’] need for  
20 the materials and the need for accurate fact-finding override the government’s interest in

2 Plaintiffs contend that Defendants have improperly asserted the deliberative process  
2 privilege over categories of documents that are facially outside its scope (*i.e.*, post-decisional  
23 documents generated after President Trump’s July 26, 2017 announcement and non-deliberative  
23 documents containing purely factual information). (Dkt. No. 245 at 15-17.) Because the Court  
23 finds that the deliberative process privilege does not apply at all, it need not address its scope.

1 nondisclosure.” *Id.* In making this determination, relevant factors include: “(1) the relevance of  
2 the evidence; (2) the availability of other evidence; (3) the government’s role in the litigation;  
3 and (4) the extent to which disclosure would hinder frank and independent discussion regarding  
4 contemplated policies and decisions.” *Id.*

5 As with all evidentiary privileges, “the deliberative process privilege is narrowly  
6 construed” and Defendants bear the burden of establishing its applicability. Greenpeace v. Nat’l  
7 Marine Fisheries Serv., 198 F.R.D. 540, 543 (W.D. Wash. 2000) (citations omitted). In addition  
8 to showing that withheld documents are privileged, Defendants must comply with formal  
9 procedures necessary to invoke the privilege. *Id.* “Blanket assertions of the privilege are  
10 insufficient. Rather [Defendants] must provide ‘precise and certain’ reasons for preserving the  
11 confidentiality of designated material.” *Id.*

#### 12           **A. Relevance of the Evidence**

13           The evidence Plaintiffs seek is undoubtedly relevant. The Court has already found that  
14 the Ban’s constitutionality “necessarily turns on facts related to Defendants’ deliberative  
15 process.” (Dkt. No. 233 at 28.) Defendants may not simultaneously claim that deference is  
16 owed to the Ban because it is the product of “considered reason [and] deliberation,” “exhaustive  
17 study,” and “comprehensive review” by the military (Dkt. No. 194 at 17; Dkt. No. 226 at 9)  
18 while also withholding access to information concerning these deliberations, including whether  
19 the military was even involved.<sup>3</sup> This information is central to the litigation and should not be  
20 withheld from the searching judicial inquiry that strict scrutiny requires. See In re Subpoena,  
21 145 F.3d at 1424; see also Johnson v. California, 543 U.S. 499, 506 (2005) (observing that strict  
22 scrutiny is intended to assure that the government “is pursuing a goal important enough to

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<sup>3</sup> The Court notes that Defendants have steadfastly refused to identify even one general or military official President Trump consulted before announcing the Ban.

1 warrant use of a highly suspect tool.”); Arizona Dream Act Coalition v. Brewer, 2014 WL  
2 171923, at \*3 (D. Ariz. Jan. 15, 2014) (holding that withheld communications were “highly  
3 relevant” because the “Court must consider the actual intent behind Arizona’s driver’s license  
4 policy when it considers the merits of this case.”). This factor weighs in favor of disclosure.

5 **B. Availability of Other Evidence**

6 Defendants possess all of the evidence concerning their deliberations over the Ban, and  
7 there is no suggestion that this evidence can be obtained from other sources. Defendants’  
8 production of non-privileged documents and an administrative record do not obviate Plaintiffs’  
9 need for responsive documents concerning the deliberative process. (See Dkt. No. 235 at 2.)  
10 This factor weighs in favor of disclosure.

11 **C. Government’s Role in the Litigation**

12 There is no dispute that the government is a party to this litigation. This factor weighs in  
13 favor of disclosure.

14 **D. Extent to Which Disclosure Would Hinder Independent Discussion**

15 While Defendants claim that disclosure “risks chilling future policy discussions on  
16 sensitive personnel and security matters” and could “potentially lead[] to a direct negative impact  
17 to national security” (Dkt. No. 266 at 12-13), they cannot avoid disclosure based on mere  
18 speculation. Instead, Defendants must identify specific, credible risks which cannot be mitigated  
19 by the existing protective order in this case (Dkt. No. 183), and must explain why these risks  
20 outweigh the Court’s need to perform the “searching judicial inquiry” that strict scrutiny  
21 requires. Johnson, 543 U.S. at 506. Because they have failed to do so, this factor weighs in  
22 favor of disclosure.

1 Having found that the deliberative process privilege does not apply in this case, the Court  
2 GRANTS Plaintiffs' Motion to Compel.

3 **III. Defendants' Motion for Protective Order**

4 Defendants move for a protective order precluding discovery directed at President  
5 Trump. (Dkt. No. 268.) Defendants concede that the President has not provided substantive  
6 responses or produced a privilege log, but contend that because the requested discovery raises  
7 "separation-of-powers concerns," Plaintiffs must exhaust discovery "from sources other than the  
8 President and his immediate White House advisors and staff" before he is required to do  
9 formally invoke the privilege. (*Id.* at 8, 10-11.)

10 The Supreme Court has recognized that discovery directed at the President involves  
11 "special considerations," and that his "constitutional responsibilities and status are factors  
12 counseling judicial deference and restraint in the conduct of litigation" against him. Cheney v.  
13 U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 385, 387 (2004) (citation omitted).  
14 Nevertheless, the President is not immune from civil discovery. Courts have permitted discovery  
15 directed at the President where, as in this case, he is a party or has information relevant to the  
16 issues in dispute. See, e.g., United States v. Nixon, 418 U.S. 683, 706 (1974) (rejecting "an  
17 absolute, unqualified Presidential privilege of immunity from judicial process under all  
18 circumstances"); Clinton v. Jones, 520 U.S. 681, 704 (1997) (noting that "[s]itting Presidents  
19 have responded to court orders to provide testimony and other information with sufficient  
20 frequency that such interactions between the Judicial and Executive Branches can scarcely be  
21 thought a novelty.").

22 The President may invoke the privilege "when asked to produce documents or other  
23 materials that reflect presidential decisionmaking and deliberations that [he] believes should

1 remain confidential.” In re Sealed Case, 121 F.3d at 744. Once he does so, those documents and  
2 materials are presumed to be privileged. Id. However, “the privilege is qualified, not absolute,  
3 and can be overcome by an adequate showing of need.” Id. at 745. If the Court finds that an  
4 adequate showing has been demonstrated (*i.e.*, that the materials contain evidence “directly  
5 relevant to issues that are expected to be central to the trial” and “not available with due  
6 diligence elsewhere”), it may then proceed to review the documents in camera to excise  
7 non-relevant material. Id. at 754, 759.

8 To date, President Trump and his advisors have failed to invoke the presidential  
9 communications privilege, to respond to a single discovery request, or to produce a privilege log  
10 identifying the documents, communications, and other materials they have withheld. While  
11 Defendants claim they need not do so until Plaintiffs “exhaust other sources of non-privileged  
12 discovery, meet a heavy, initial burden of establishing a heightened, particularized need for the  
13 specific information or documents sought, and at a minimum substantially narrow any requests  
14 directed at presidential deliberations” (Dkt. No. 268 at 3), the Court finds no support for this  
15 claim. To the extent the President intends to invoke the privilege, the Court already ordered that  
16 he “‘expressly make the claim’ and provide a privilege log ‘describ[ing] the nature of the  
17 documents, communications, or tangible things not produced or disclosed—and do so in a  
18 manner that, without revealing information itself privileged or protected, will enable other parties  
19 to assess the claim.’” (Dkt. No. 235 at 3 (quoting Fed. R. Civ. P. 25(b)(5)(i)-(ii).) Only then can  
20 the Court evaluate whether the privilege applies and if so, whether Plaintiffs have established a  
21 showing of need sufficient to overcome it.

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1 Having found that President Trump has failed to demonstrate that he need not invoke the  
2 presidential communications privilege, the Court DENIES Defendants' Motion for a Protective  
3 Order.

4 **Conclusion**

5 The Court ORDERS as follows:

- 6 1. The Court GRANTS Plaintiffs' Motion to Compel and ORDERS Defendants to turn over  
7 those documents that have been withheld solely under the deliberative process privilege  
8 within 10 days of the date of this Order;
- 9 2. The Court DENIES Defendants' Motion for a Protective Order and ORDERS Defendants  
10 to produce a privilege log identifying the documents, communications, and other  
11 materials they have withheld under the presidential communications privilege within 10  
12 days of the date of this Order;
- 13 3. The Court notes that the government privilege logs it has reviewed to date are deficient  
14 and do not comply with Federal Rule of Civil Procedure 26(b)(5)(A)(i)-(ii). (See Dkt.  
15 No. 246, Exs. 11-27.) Privilege logs must provide sufficient information to assess the  
16 claimed privilege and to this end must (a) identify individual author(s) and recipient(s);  
17 and (b) include *specific, non-boilerplate* privilege descriptions *on a document-by-*  
18 *document basis*. To the extent they have not already done so, the Court ORDERS  
19 Defendants to produce revised privilege logs within 10 days of the date of this Order;
- 20 4. Should any discovery disputes remain following Defendants' compliance with the above  
21 directives, the parties shall bring them before the Court jointly using the procedure set  
22 forth in LCR 37.

The clerk is ordered to provide copies of this order to all counsel.

Dated July 27, 2018.

Wassily Klemm

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Marsha J. Pechman  
United States District Judge